IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No. 6 of 2006
with
Civil Application No.19 of 2006

1. Laxman Sharnappa Gaikwad
and others ..Appellants

vs.

1. Smt.Sumitra Dadappa Gaikwad
and others ...Respondents

Shri N.V.Bandivadekar for appellants.
Shri G.S.Godbole with Shri Nitin Muley for
respondent nos.1 and 2

CORAM: S.C.DHARMADHIKARI J.
22nd August, 2007

P.C.

1. Heard Shri Bandivadekar for the appellants and Shri Muley for respondent nos. 1 and 2.

2. This second appeal is at the instance of the original defendants. They are aggrieved and dissatisfied with the judgment delivered on 6th October, 2005 by the lower Appellate Court dismissing their appeal.

3. The appellants are the heirs of original defendant no.1. The original plaintiffs filed the suit being Reg.Civil Suit No.31 of 1988 seeking relief of declaration and permanent injunction to restrain the present

appellants from obstructing their possession with regard to eastern side of the portion of the land bearing Gat No.106 admeasuring 4 H and 76 R and the right of the plaintiffs to take water from the well as per the share.

4. The greivance of Shri Bandivadekar is that initially this civil suit was dismissed. The matter was carried in appeal and the Appellate Order is specifically referred to by the learned Trial Judge. The appellate order remands the suit in its entirety to the Trial Court for hearing and final disposal, after the original plaintiffs amended the plaint and included Gat No.76 situated in village Hattikanbas and open space i.e. Gram Panchayat No.253. Thus, in addition to portion of Gat No.106, the above mentioned land has been the subject matter of the suit. Upon remand, the suit for perpetual injunction and declaration also contained alternative prayer for partition. Therefore, when the plaintiffs admittedly included two more properties in the suit and sought partition thereof, the courts below could not have decreed the suit for declaration and permanent injunction with regard to survey no.106 without in any manner considering the partition of remaining two properties. In other words, the appellants/defendants had a right to seek partition with regard to the other properties which have

been included. Therefore, the Trial Court was obliged to direct partition of the land other than Gat no.106.

5. Even with regard to Gat No.106 no document evidencing partition has been produced. In the submission of Shri Bandivadekar, mere production of mutation entry no.472 does not evidence partition of this land. For all these reasons substantial question of law would arise and the second appeal, therefore, should be entertained.

6. Shri Mulay, on the other hand, submits that upon remand it was equally open for the appellants to step into the witness box and bring material with regard to their share in the remaining properties. They did not step into the witness box and produce any material. Therefore, the Courts below cannot be faulted for the approach that it took. That apart, with regard to survey no.106, it is concurrently observed that partition was effected inrespect of this land as early as on 20th May, 1961 and all that the mutation entry evidences is the right to get water from the well situated in the portion thereof. That is also apportioned and divided. In such circumstances, erroneous reading of the Mutation entry would not mean that there is no partition.

7. At the out set, I may make it clear that if the appellants feel that they have right, title and interest in the land Gat No.37 situated at village Hattikanbas and open space i.e. gram panchayat no.253, then, despite their not stepping into the witness box in the present suit and producing any material therein does not mean that they are disentitled for ever to seek partition of this land, based upon their share therein. That remedy is always open to be availed of and even the rejection of second appeal against the concurrent judgment and order would not be an impediment in doing so.

8. With regard to the submission that Gat No.106 has not been partition and there is no evidence in that behalf, I am of the opinion that the Courts below have correctly appreciated all the materials with regard to Gat No.106. In Para 12 of the order passed by the lower Appellate Court, the deposition of the plaintiff and her witnesses has been referred to. Gat no.106 was originally survey no.46. In 1960, partition took place between the plaintiff's father in law Shankar and his cousin brother Huseni, through whom the present defendants are claiming. After effecting the said partition Shankar, father in law of the plaintiff and Huseni, father of the original defendant started cultivating the lands independently to

the extent of their share and until death of Shankar, the same position continued. After the death of Shankar, his son Dadappa i.e.husband of the plaintiff inheritted the property and it was mutated in his name. After the death of Huseini, original defendant no.1 Sharanappa became owner of half share of the property and cultivating the same independently. There is a further mutation in the year 1986 after the death of Daddappa. These facts are not disputed. According to the Courts below, parties like the present appellants, are taking advantage of the provisions of the consolidation scheme in the village and of the fact that during that period the lands were merged for the purpose of consolidation and gat numbers were assigned thereto. Thus, it is not merely mutation entry no.472 which is made the basis of the finding for partition. Partition of land bearing Gat No.106 is a finding based on other material as well. The finding in that behalf cannot be said to be perverse. It is not uncommon that parties cultivating the lands independently and the said cultivation being evidenced by mutation entry, lateron, turn round and seek advantage of the consolidation proceedings. The mutation of the property for the purpose of consolidation would in no way take away the case of partition of land and that is how the Courts below proceeded. That is a finding rendered consistent

with the material which, to my mind, cannot be reappreciated and reappraised in my limited jurisdiction. Having clarified the matter as above, I see no merit in this second appeal which is accordingly dismissed. In view of dismissal of the second appeal civil application does not survive and hence the same is also dismissed as such.

(S.C.DHARMADHIKARI J.)